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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 74-5808

ABRAHAM FRANCIS
Petitioner

Versus

C. MURRAY HENDERSON, WARDEN
LOUISIANA STATE PENITENTIARY,
Respondent

On Application For Writ Of Certiorari To
the United States Court Of Appeals for
The Fifth Circuit

RESPONSE OF STATE OF LOUISIANA

In 1964 Abraham Francis, petitioner herein, was indicted for murder by the Orleans Parish Grand Jury. In 1965 Francis was tried in the Criminal District Court for the Parish of Orleans, found guilty, and sentenced to life imprisonment. At no time, either prior to or during his trial, did Francis challenge the method of jury selection in Orleans Parish, thus waiving the issue under the then existing procedural statute, La. R.S. 15:202, as interpreted by the Louisiana Supreme Court in State v. Wilson, 204 La. 24, 14 So.2d 873 (1943), and State v. Chianelli, 226 La. 552, 76 So.2d 727 (1954), to the effect that in Louisiana an attack on the grand jury must be made before the end of the third day after expiration of the grand jury's

term, or before trial, whichever is earlier; that an objection to a petit jury must be filed some time prior to trial; and that if the jury issue is not timely raised it is waived. See Michel v. Louisiana, 350 U.S. 91 (1955).

Francis did not appeal his conviction to the Louisiana Supreme Court. However, in 1971 he filed a Petition For Writ of Habeas Corpus in the Criminal District Court for the Parish of Orleans, alleging that the grand and petit juries in his case had been chosen in a manner which discriminated against the black race, of which he is a member. The Louisiana trial court held that Francis had waived his right to raise such questions by not urging them timely. The Louisiana Supreme Court also denied Francis' Petition for Writ of Habeas Corpus.

Thereafter, in March of 1972, Francis filed his Petition For Writ Of Habeas Corpus in the United States District Court for the Eastern District of Louisiana. In September of 1973 the United States District Court set aside Francis' conviction and sentence on the ground that the Grand Jury which indicted him was invalidly selected. Relying on Davis v. United States, 411 U.S. 233 (1973), the State of Louisiana appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit reaffirmed its earlier holding in Jones v. Henderson, 494 F.2d 47 (1974), and, relying on Davis v. United States, supra, held that Francis had waived his right to attack the composition of his juries by not acting timely, but remanded the matter to the United States District Court to enable Francis to attempt to avoid the waiver principle by showing actual prejudice. Newman v. Henderson, 496 F.2d 896 (5th Cir. 1974).

ARGUMENT

I.

The Waiver Principle Of Davis Should Apply Equally To The Several States

In Davis v. United States, 411 U.S. 233 (1973), the accused, a black man, went to trial without objecting to the composition of the grand jury which indicted him, an issue which under Rule 12 (b)(2) of the Federal Rules of Criminal Procedure must be raised by motion prior to trial. Approximately three years after his conviction Davis filed a motion to dismiss the indictment pursuant to 28 U.S.C. 2255, alleging that qualified Negro jurymen had been systematically excluded from the grand jury which indicted him, and that his collateral attack on his conviction could be precluded only after a hearing in which it was established that he deliberately bypassed or understandingly and knowingly waived his claim to unconstitutional grand jury composition, relying, inter alia, on Fay v. Noia, 372 U.S. 391 (1963), and Kaufman v. United States, 394 U.S. 217 (1969). In holding that Davis had waived his right to challenge the composition of his grand jury, this Court said: (at 411 U.S. 241-242)

> "The waiver provisions of Rule 12(b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings. If

its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

"* * *

"We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to

that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires. We therefore hold that the waiver standard expressed in Rule 12(b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review."

The State of Louisiana respectfully submits that the reasoning of Davis applies equally well to state criminal proceedings. At the time of Francis' trial in 1965, La. R.S.15:202 (as interpreted in State v. Wilson and State v. Chianelli, supra) provided that in Louisiana criminal proceedings an attack on a grand jury must be made before the end of the third day after the expiration of the grand jury's term, or before trial, whichever was earlier; and that a challenge to the petit jury must be filed some time prior to trial, "otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard." See Michel v. Louisiana, supra, in which this Court held that the waiver provisions of La. R.S. 15:202 did not violate the Fourteenth Amendment.

Surely this Court will not apply a stricter rule to the several states than it does to the federal government. The waiver standard expressed in former La. R.S. 15:202 should govern an untimely claim of jury discrimination not only during the Louisiana criminal proceeding, but also later on federal

collateral review. The rule of Davis should in all fairness be available to the several states.

II.

The "Actual Prejudice" Principle of Davis Should Also Apply To The Several States

In Davis this Court quoted with approval the following exerpt from its opinion in Shotwell Mfg. Co. v. United States, 37 1 U.S. 341 (1963), on which the lower court had relied in denying relief, regarding the question of prejudice:

> ". . . where, as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule." 371 U.S. at 363.

Thereafter, this Court's opinion in Davis continues thus: (411 U.S. at 244-245)

> "Petitioner seeks to avoid this aspect of Shotwell by asserting that there both lower courts had found that petitioners were not prejudiced in any way by the alleged illegalities whereas under Peters v. Kiff, 407 U.S. 493 (1972), prejudice is presumed in cases where there is an allegation of racial discrimination in grand jury composition.

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But Peters dealt with whether or not a white man had a substantive constitutional right to set aside his conviction upon proof that Negroes had been systematically excluded from the state grand and petit juries which indicted and tried him. Three Justices dissented from the Court's holding of such a substantive right on the ground that no prejudice had been shown, and three concurred separately in the judgment. But the three opinions delivered in Peters, supra, all indicate a focus on the existence of the constitutional right, rather than its possible loss through delay in asserting it. The presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner." (Emphasis ours)

In the interest of finality and reasonably current dockets, the State of Louisiana respectfully submits that for the several states as well as for the federal government the waiver-by-failure-to-object and actual-prejudice principles of Davis v. United States should prevail over the "deliberate bypass" test of Fay v. Noia, 372 U.S. 391 (1963). Otherwise, the administration of criminal justice in the several states will continue to be unduly hobbled by the relitigation of ancient

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issues which were waived by not being timely raised at the original trial. In the words of Longfellow, the State of Louisiana urges this Court to "Let the dead Past bury its dead!"*/

CONCLUSION

The State of Louisiana respectfully asks this Honorable Court to deny Abraham Francis' Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF LOUISIANA

BARBARA RUTLEDGE,
ASSISTANT ATTORNEY GENERAL
OF LOUISIANA

HARRY F. CONNICK,
DISTRICT ATTORNEY FOR THE
PARISH OF ORLEANS

LOUISE KORNS,
ASSISTANT DISTRICT ATTORNEY
FOR THE PARISH OF ORLEANS

Louise Korns

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*/ Psalm Of Life.